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NETWORK APPLIANCE, INC.,

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

NETWORK APPLIANCE, INC.

Plaintiff-Counterclaim Defendant,

v.

SUN MICROSYSTEMS, INC.

Defendant-Counterclaim Plaintiff.

Case No. C-07-06053 EDL

**PLAINTIFF NETAPP, INC.'S  
OPPOSITION TO DEFENDANT SUN  
MICROSYSTEMS, INC.'S *EX PARTE*  
APPLICATION TO SHORTEN TIME  
FOR HEARING ON SUN'S STAY  
MOTION**

1 Pursuant to Civil Local Rule 6-3(c), NetApp, Inc. (“NetApp”) opposes Sun  
2 Microsystems, Inc.’s (“Sun’s”) *ex parte* application to shorten time for its stay motion [Docket  
3 35].

4 **I.**

5 **SUN’S *EX PARTE* APPLICATION SHOULD BE DENIED BECAUSE NETAPP**  
6 **DESERVES THE NORMAL TIME FOR OPPOSING MOTIONS AND THERE IS NO**  
7 **GOOD REASON TO DEPRIVE IT OF SUCH TIME**

8 Sun’s application to shorten time should be denied. Sun’s stay motion is  
9 recognized by all as a consequential motion that seeks to reshape this litigation and, in NetApp’s  
10 view, threatens to delay vital relief of real significance to NetApp and valuable clarity to the open  
11 source community. Given the stakes, it is particularly important that NetApp receive the normal  
12 amount of time to prepare its opposition to Sun’s stay motion. That opposition will require, not  
13 only the preparation of argument, but the substantial development of evidence, such as witness  
14 testimony, that warrants the normally allowed time. In addition, Sun’s proposal would  
15 substantially shrink the Court’s time to consider the parties’ briefing and evidence.

16 To justify this marked deviation from the normal rules, Sun argues only that  
17 shifting the hearing date by two weeks will somehow spare the litigation teams substantial work.  
18 However, during the two weeks that Sun proposes to “save” by this *ex parte* application, the  
19 parties owe no submissions to the Court. In fact, during that period, the parties are simply in the  
20 midst of a 43-day period for meeting and conferring on the disputed claim terms that they  
21 identified to each other on April 10. Surely the parties can meet and confer efficiently to  
22 minimize Sun’s concerns. In the end, the reality is that the litigation teams are very busy in their  
23 three cases and the supposed burden purportedly justifying this motion is in no way material.

24 In addition, any alleged burden caused by the normal May 20 hearing date stems  
25 directly from Sun’s own failures and should not now be used to provide Sun a with tactical  
26 advantage on the stay motion by shortening NetApp’s time. Specifically, Sun failed to comply  
27 with elementary Patent Office filing requirements in all three of its reexam requests, causing them  
28 to have to be re-filed. If it had not made these errors, this motion could have been resolved  
already. The *ex parte* application should be denied.

**A. The Stay Motion Is An Important Motion Involving A Substantial Evidentiary Record And Warranting At Least The Normal Time Allocation**

As established in this section, Sun's stay motion is a consequential motion involving a substantial evidentiary record. NetApp brought this case due to Sun's brazen infringement of its patents through the use of key patented features of the NetApp products in its ZFS software. This infringement is particularly pernicious in that Sun is giving the infringing ZFS software away for free so that it can sell its other products and damage the market success of its competitors such as NetApp. Basically, Sun is attempting to damage seriously the market that NetApp pioneered with its industry leading data storage products. Declaration of Aaron M. Nathan in Support of NetApp, Inc.'s Opposition to Defendant Sun Microsystems Inc.'s *Ex Parte* Application to Shorten Time for Hearing on Sun's Stay Motion ("Nathan Decl.") at ¶ 13.

That Sun is exploiting NetApp's technology in ZFS is clear from Sun's own statements in which it essentially concedes it uses NetApp's patented WAFL technology. For instance in a paper entitled "The Zettabyte File System," Jeff Bonwick et al., write, "The best way to avoid file system corruption due to system panic or power loss is to keep the data on the disk self-consistent at all times, as WAFL does." Exh. A. (Bonwick et al.) at 4. Bonwick continues, "The file system that has come closest to our design principles, other than ZFS itself, is WAFL...[which] was the first commercial file system to use the copy-on-write tree of blocks approach to file system consistency." Id. at 11-12. Val Henson, co-author on the same paper, in a blog entry entitled "Cool systems paper: WAFL," writes, "In my opinion, [NetApp's WAFL paper] describes the most significant improvement in file system design since the original FFS in 1978... The ZFS team thinks that a copy-on-write, transactionally updated general purpose UNIX file system is not only feasible but an excellent idea – which is why we wrote ZFS." Exh. B. at 3.

The parties arrived at this Court with this important case because they knew that this Court would diligently and effectively resolve their claims promptly:

Plaintiff believes in particular that having Judge Laporte preside over both of the parties' patent cases will lead to a just and speedy resolution of all of their disputes. Counsel for the parties have conferred with Judge Laporte, who has agreed to hear this matter and to conduct a prompt Case Management Conference with the goal of a prompt resolution of the disputes. The parties have

1 consented to have Judge Laporte hear this matter for all purposes[.]  
 2 Agreed Motion to Transfer at 1-2. *NetApp v. Sun* (9:07-cv-206 RHC, E.D. Tex.) [Docket 37].

3 Instead of keeping these claims with this Court for resolution, Defendant's stay  
 4 motion is an attempt to reshape this litigation by slowing NetApp's pursuit of key patent claims  
 5 by channeling them to a slower and less certain venue – even though the parties specifically  
 6 requested this Court to resolve their claims. It is well-known that, for a variety of reasons, almost  
 7 all requests to begin reexams are granted. *See, e.g., Corbett Decl. In Support of Sun's Stay*  
 8 *Motion, Exh. D* [Docket 39-5] at 1. Therefore, if motions for stay pending reexam were really as  
 9 simple as Sun claims, virtually every defendant could grind its case to a halt using this tactic. Of  
 10 course, the analysis is more complex than Sun lets on. In circumstances such as this, where  
 11 timely resolution is so significant, such motions should be assessed even more critically.

12 NetApp deserves a full and fair opportunity to address these and other significant  
 13 issues raised by Sun's stay motion. NetApp will respond in its opposition to the many arguments  
 14 made in Sun's stay motion, including its many assertions about what happened in the reexams, its  
 15 statistical analyses of the Patent Office in both *inter partes* and *ex parte* reexams, and its specific  
 16 assertions that the delay caused by the extended stay it proposes will not cause NetApp  
 17 irreparable harm. The opposition will thus require gathering evidence, lining up witnesses, and  
 18 determining what witnesses and testimony should or should not be submitted on this motion.  
 19 This process can be time consuming and it deserves—at a minimum—the normal time allotted to  
 20 respond to a motion. NetApp would normally have until April 29 to respond to the motion.  
 21 Slicing five days off that time, as Sun seeks to accomplish, is not warranted. Nathan Decl. at ¶ 15.

22 **B. The Court Should Not Accept Sun's Claim That The Two Week Shortening Is**  
 23 **Necessary To Avoid Prejudice To Sun**

24 Sun seeks to move the stay motion hearing date by two weeks from the normal  
 25 May 20 date to May 6. The theory of the motion is that speeding the hearing up by two weeks  
 26 will avoid “prejudice” to Sun. *Ex Parte* Application at 3 [Docket 35]. Nathan Decl. at ¶ 16.

27 To prove prejudice, Sun portrays as substantial the alleged burdens that will be  
 28 avoided by its *ex parte* application:

Between now and May 20 [the normal hearing date], the parties will meet-and-confer, exchange preliminary proposed claim construction and extrinsic evidence and prepare a Joint Claim Construction and Prehearing Statement...If the Court grants Sun's Motion to Stay on an expedited schedule, the parties and ultimately the Court will not have to address these claim terms at this time (or at all)."

Sun's *Ex Parte* Application at 3 [Docket 35].

This is not a fair characterization of the record. The exchange of preliminary proposed constructions and extrinsic evidence is scheduled to take place by April 30, *before* Sun's proposed hearing date, and the parties are required by Local Rule to meet and confer even before that. Case Management Scheduling Order [Docket 20] at 2; Patent L.R. 4-1(b). The Joint Claim Construction and Prehearing Statement is due on May 23, *after* the hearing would take place on the normal briefing schedule. Minutes to CMC in C-07-05488 [Docket 34]. Nathan Decl. at ¶ 17. In short, two of the events that supposedly prejudice Sun if NetApp's response time is not truncated *cannot* be avoided, because they will have occurred regardless, and the other could be avoided by a finding in Sun's favor at a hearing scheduled on the normal date.

What, then, is scheduled to occur during the allegedly prejudicial two-week period? Very little: The parties must continue to meet and confer based upon their April 8 exchange of terms and their April 30 exchange of definitions. Nathan Decl. at ¶18. With three related cases of this magnitude, surely this meet and confer obligation will not materially affect the overall workload of the respective parties.

### **C. The Timing Of Sun's Stay Motion Is A Product Of Its Own Failures**

Sun's original attempt to file reexams to pursue its stay strategy failed. Sun did not comply with basic filing requirements, which caused *months* of delay, creating the very circumstance about which it now complains.

On November 30, 2007, Sun filed its request for reexam of the '001 patent. Exh. C. On January 11, 2008, the PTO responded with a notice of failure to comply with *inter partes* reexamination request filing requirements. Exh. D. On February 8, 2008, Sun corrected its request. Exh. E. Sun filed its request for reexam of the '211 patent on December 14, 2007. On December 31, 2007, the PTO responded with a notice of failure to comply. Exh. F. On January

1 14, 2008, Sun corrected its request Exh. G. Sun filed its request for reexam of the '292 patent on  
 2 October 25, 2007. Exh. H. On December 10, 2007, the PTO responded with a notice of failure to  
 3 comply. Exh. I. On December 26, 2007, Sun corrected its request. Exh. J.

4 The requests actually accepted by the PTO as to the '001, '211, and '292 patents were  
 5 filed approximately 70 days, 31 days, and 62 days, respectively, after Sun's initial non-compliant  
 6 attempts. Nathan Decl. at ¶ 19. Because the reexams were granted for those same patents on  
 7 April 7, April 2, and March 18, respectively, subtracting the delay caused by Sun's own failures,  
 8 the reexams might have been granted on January 28, March 2, and January 16, respectively.  
 9 Assuming that Sun would wait, as it did here, until eight days after all three requests were granted  
 10 before filing its motion, it could have filed its motion by about March 10.<sup>1</sup> This would have  
 11 resulted in a hearing date of April 14, 2008, one day before Sun finally managed to file its actual  
 12 motion. Nathan Decl. at ¶ 20. Had Sun complied with basic PTO procedure, Sun could have had  
 13 a hearing roughly 22 days before the expedited hearing it now requests, and without needing to  
 14 shave off a single day of NetApp's rightful time to respond or of the Court's time to consider the  
 15 briefing. Therefore Sun's purported hardship is caused by its own failures.

16 NetApp respectfully requests this court to deny Sun's *ex parte* application.

17 Dated: April 18, 2008

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1 If time were really of the essence for Sun, presumably Sun would not have waited until all three requests had been granted before seeking a partial stay.